

1 THE HONORABLE RICARDO S. MARTINEZ

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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

10 UNITED STATES OF AMERICA,

11 Petitioner,

12 vs.

13 MICROSOFT CORPORATION, et al.,

14 Respondents.
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NO. 2:15-cv-00102 RSM

OPPOSITION TO UNITED STATES'
MOTION TO EXCLUDE PROFFERED
TESTIMONY OF DANIEL ROSEN
AND JAMES O'BRIEN OR IN THE
ALTERNATIVE TO DISQUALIFY
THEM AS ATTORNEYS IN THIS
MATTER

1 Microsoft opposes the IRS's motion to exclude the testimony of Daniel Rosen and
2 James O'Brien. Messrs. Rosen and O'Brien are two of the attorneys representing Microsoft in
3 this matter.

4 Microsoft submitted declarations from Rosen and O'Brien months ago. Until a few
5 days ago (July 13), the IRS never complained about these declarations. For the first time, the
6 IRS now objects to the testimony of Rosen and O'Brien. The IRS states, however, that it will
7 not object to testimony by Rosen or O'Brien at the July 21 evidentiary hearing as long as such
8 testimony does not go beyond the four corners of their declarations.

9 The Court should deny the IRS's motion. First, the IRS filed the motion in violation of
10 its obligations to meet and confer with Microsoft. Second, there is no legal basis in the
11 Washington Rules of Professional Conduct ("RPC"), or elsewhere, to prevent Rosen or
12 O'Brien from testifying beyond the four corners of their declarations. The lawyer-as-witness
13 rule (RPC 3.7 or the Rule) is the only authority the IRS relies upon. That rule does not apply
14 here. The Rule applies "at a trial;" the scheduled evidentiary hearing is not a "trial." In
15 addition, the Rule only applies to lawyers who "act as advocate." Neither Mr. Rosen nor Mr.
16 O'Brien will be acting as an advocate before the Court at the evidentiary hearing. Third, RPC
17 3.7 does not support the remedies the IRS requests. RPC 3.7 prevents a lawyer from acting as
18 advocate at a trial in which the lawyer is likely to be a necessary witness, unless an exception to
19 the Rule applies. The Rule neither prevents a lawyer from testifying nor provides for
20 disqualification of the lawyer.

21 ARGUMENT

22 I. The IRS Filed Its Motion in Violation of Its Obligation to Meet and Confer with 23 Microsoft.

24 The IRS filed its motion without meeting the requirements of the local rules, because
25 the United States did not confer in good faith with Microsoft, as required by Local Civil Rule
7(d)(4).

1 Microsoft submitted declarations from Rosen and O'Brien months ago, in connection
2 with its Motion for an Evidentiary Hearing. The United States did not object to the
3 declarations, nor move to strike them. For the first time, by e-mail on July 13, 2015, the IRS
4 notified Microsoft that it intended to "move the court to exclude [Rosen and O'Brien] as
5 witnesses or in the alternative to disqualify [them] from serving as attorneys for Microsoft in
6 this matter" unless Microsoft amended its witness list "to confine the testimony of [Rosen and
7 O'Brien] solely to the existing declarations[.]" Declaration of Patty A. Eakes ("Eakes Decl."),
8 Ex. A (July 13, 2015, Email from Noreene Stehlik to Daniel Rosen). The IRS stated that it
9 believed testimony, beyond the four corners of the existing declarations, would be "completely
10 improper" but provided no legal basis for any of its claims. *Id.*

11 Microsoft responded the next day. By email, Microsoft explained that it did not
12 understand the IRS's position and requested additional information from the IRS, including the
13 testimony that the IRS believes would be improper and the government's legal basis for
14 excluding such testimony. Eakes Decl., Ex. B (July 14, 2015, Email from Daniel Rosen to
15 Noreene Stehlik). Microsoft also explained that the issue, whatever it was, was not yet ripe.
16 Microsoft also disclosed to the IRS that Microsoft does not presently plan to call O'Brien or
17 Rosen at the hearing, but that whether Microsoft would end up doing so, and what the nature of
18 any testimony would be, would depend on how the hearing develops, and especially on the
19 substance of Mr. Hoory's testimony, which Microsoft cannot predict. *Id.* The IRS never
20 responded. Instead, about one hour later, it filed its motion.

21 Further, the IRS has never explained its assertion that testimony within the scope of the
22 O'Brien and Rosen declarations is permitted under RPC 3.7, but that testimony beyond the
23 declarations would be improper. RPC 3.7 does not support the government's position or the
24 attempt by the IRS to hamstring Microsoft's witnesses.

1 **II. RPC 3.7(a) Does Not Apply Because the July 21, 2015 Evidentiary Hearing Is Not**
2 **a “Trial.”**

3 The IRS solely relies on RPC 3.7(a), which provides that a lawyer shall not act as
4 advocate “at a trial” in which the lawyer is likely to be a necessary witness. The IRS ignores
5 the Rule’s plain language. This Court, in a case the IRS omits from its motion, adopted a plain
6 reading of RPC 3.7(a) in *Microsoft Corp. v. Immersion Corp.*, No. C07-936RSM, 2008 WL
7 682246, at *3 (W.D. Wash. March 7, 2008) (Martinez, J.). This Court explained that “the plain
8 language of Washington RPC 3.7(a) is unequivocally clear in only prohibiting attorneys from
9 acting as an advocate *at trial*.” *Id.* (emphasis in original). RPC 3.7(a) is “focused on the trial,
10 where the lawyer’s dual role as advocate and witness intersect in a way that the rule is designed
11 to prevent.” Mark J. Fucile, *The Lawyer-Witness Rule: What It Is and What It Isn’t*,
12 Washington State Bar News 36, 37-38 (Oct. 2007) (copy attached as Eakes Decl., Ex. C).

13 The July 21 hearing is not a “trial.” It is a *preliminary evidentiary hearing* to determine
14 whether Microsoft is entitled to certain discovery. A summary proceeding is not a trial. Thus,
15 there is no likelihood of the tribunal being misled, and no prejudice or harm to the client. *See*
16 *cmt 4 to RPC 3.7* (“Whether the tribunal is likely to be misled or the opposing party is likely to
17 suffer prejudice depends on the nature of the case, the importance and probable tenor of the
18 lawyer’s testimony, and the probability that the lawyer’s testimony will conflict with that of
19 other witnesses.”). As a result, RPC 3.7 does not apply.

20 **III. RPC 3.7(a) Does Not Apply Because Rosen and O’Brien Will Not Be Acting as**
21 **“Advocate[s]” at the Hearing.**

22 RPC 3.7(a) only applies to prohibit a lawyer from acting as an “advocate” at a trial in
23 which the lawyer is likely to be a necessary witness. Even if the hearing were a “trial,” the
24 Rule would not apply here because Rosen and O’Brien will not be acting as Microsoft’s
25 advocates. They will not be examining witnesses or presenting oral argument. These activities
will be performed by other attorneys representing Microsoft who have appeared in the case.

1 Mr. Rosen and Mr. O'Brien will attend the hearing and assist and advise co-counsel, as
2 appropriate, but will not advocate before this Court at the evidentiary hearing, which the IRS
3 would have known had it satisfied the meet and confer requirement. As a result, the concern
4 that motivates RPC 3.7—that “the trier of fact may be confused or misled by a lawyer serving
5 as both advocate and witness”—is not implicated. Cmt. 2 to RPC 3.7. Because Rosen and
6 O'Brien will not act as advocates at the hearing, by its plain language, RPC 3.7(a) is not
7 implicated and cannot apply to exclude their testimony.

8 **IV. The Remedies That the IRS Requests Are Not Permitted Under RPC 3.7(a).**

9 The IRS's motion asks the Court to grant two forms of relief, neither of which RPC
10 3.7(a) permits. The IRS asks to either: (1) exclude the testimony of Mr. Rosen and Mr. O'Brien
11 from the hearing, or (2) disqualify them from representing Microsoft in this case. RPC 3.7,
12 when it applies, bars advocacy, not testimony. *See United States v. Vereen*, 429 F.2d 713, 715
13 n.3 (D.C. Cir. 1970) (“[D]oubts should be resolved in favor of the lawyer testifying and against
14 his becoming or continuing as an advocate.”) (quoting former ABA Code of Prof'l
15 Responsibility EC 5-10). The Rule only bars advocacy before the fact finder at trial; it does not
16 prevent the attorney from participating in other aspects of the case. *See* cmt. 3 to RPC 3.7 (rule
17 prohibits lawyer “from *simultaneously* serving as advocate and necessary witness”) (emphasis
18 added); *In re Disciplinary Proceeding Against Pfefer*, 182 Wn.2d 716, 726, 344 P.3d 1200
19 (2015) (finding no error where counsel had been permitted to “sit at counsel's table and advise
20 [client] throughout the hearing” at which he also testified as a fact witness); *State v. Fackrell*,
21 44 Wn.2d 874, 876, 271 P.2d 679 (1954) (“Continuing to sit at the counsel table did not, under
22 the circumstances here disclosed, constitute assistance in the trial of the case and hence, was
23 not a violation of the canons of ethics.”); Fucile, *The Lawyer-Witness Rule: What It Is and*
24 *What It Isn't*, Washington State Bar News 36, 37 (Oct. 2007). Thus, RPC 3.7(a) does not
25 require disqualification of Rosen and O'Brien from either continuing to participate in the case

1 or participating in the evidentiary hearing in a non-advocacy role.

2 **CONCLUSION**

3 Microsoft respectfully requests that the IRS's motion be denied. The IRS violated its
4 obligation to meet and confer with Microsoft. RPC 3.7 does not apply here and, even if it did,
5 it permits none of the relief that the IRS seeks.

6 DATED this 16th day of July, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Amy Matchison, Jeremy N. Henson, Noreene C. Stehlik, James E. Weaver and the U.S. Department of Justice; Daniel A. Rosen, James M. O'Brien and Baker & McKenzie LLP; Robert B. Mitchell, Hugh Frederick Bangasser and K&L Gates LLP; George E. Greer and Orrick Herrington & Sutcliffe; Stephen M. Rummage and Davis Wright Tremaine; Philip S. Beck, Sean W. Gallagher, Brian S. Prestes, Robert B. Tannenbaum and Bartlit Beck Herman Palenchar & Scott LLP, and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants: N/A.

s/ Florine Fujita _____

Florine Fujita